Supreme Court, U. S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLERK

No. 79-1309

In the Supreme Court of the United States

OCTOBER TERM, 1979

CARL MICHAEL SEIBERT, PETITIONER

v.

D. T. BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1309

CARL MICHAEL SEIBERT, PETITIONER

v.

D. T. BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner brought this action in the United States District Court for the Northern District of Alabama against a number of individuals, including five present and former employees of the Internal Revenue Service, seeking damages and other relief for alleged constitutional violations in connection with the termination of his taxable year 1972 and the subsequent seizure and disposition of his property (R. 2).[1] The property was

---

[1] "R." refers to the record on appeal filed in the court of appeals. Petitioner's original complaint also named two employees of the Huntsville, Alabama, police department and an Alabama state court judge. The action against the Huntsville police department employees was thereafter dismissed on petitioner's own motion and the action against the state court judge was dismissed on grounds of judicial immunity (R. 6, 7, 11). Those parties are therefore no longer in the case. Petitioner thereafter filed an amended complaint naming the five federal defendants and a sixth individual characterized therein as a "paid informer" of the Huntsville police department (R. 27-33).

seized on July 10, 1972, from the custody of the Huntsville, Alabama, police department, which had impounded it following petitioner's arrest on July 7, 1972, for possession of illegal drugs. At that time, the Internal Revenue Service served petitioner with a Notice of Termination of Taxable Period pursuant to Section 6851 and a Notice of Seizure pursuant to Section 6331 of the Internal Revenue Code of 1954, indicating that it was seizing his property in satisfaction of income taxes determined to be due for the terminated period in the amount of $6,458 (Pet. App. A, a4-a5).

The district court had dismissed a previous action filed by petitioner and his father to enjoin the Internal Revenue Service from selling the seized property and to compel an explanation of the basis for the seizure on the ground that it was barred by the Anti-Injunction Act, 26 U.S.C. 7421(a) (Pet. App. A, a5). Petitioner thereafter brought this action, claiming that the termination of his taxable year and seizure of his property were unjustified, that the procedures required with respect to jeopardy assessments under Section 6861 of the Code had not been followed, that he was not given proper notice and demand for payment, and that the Internal Revenue Service had improperly disposed of some of the seized items.[2] The

[2]The Internal Revenue Service determined that some of the property seized (an automobile and a guitar) belonged to others, and returned these items to those individuals. Petitioner claims that the guitar had been given to him, and that it should not have been returned to the alleged donor. He also objected to the fact that a sum of money, which allegedly consisted of a currency collection of sequentially numbered, uncirculated bills and silver certificates, was credited to the asserted liability only at face value (Pet. App. A, a8). At some point following the seizure of the property in question, the termination assessment was withdrawn, and a notice of deficiency was issued to the petitioner for 1972. Petitioner sought a redetermination of the asserted deficiency in the Tax Court. That action was terminated on the stipulation of the parties that there had been an overpayment of petitioner's taxes for 1972 in the amount of $2,893.15 (Pet. App. A, a5-a6).

district court dismissed petitioner's complaint for lack of subject matter jurisdiction, holding that a suit against federal employees for damages arising out of their official activities could be brought, if at all, only under 28 U.S.C. 1331 pursuant to an implied cause of action for redress of alleged constitutional violations. The district court further held that petitioner's complaint failed to state a Fourth Amendment violation. Since the Fifth Circuit had previously held in *Davis* v. *Passman*, 571 F. 2d 793 (1978), that no cause of action for damages could be implied under the Fifth Amendment due process clause, the district court ruled that petitioner's complaint failed to state any cognizable claim for damages[3] (Pet. App. A, a11-a21).

The court of appeals originally affirmed the decision on the basis of the district court's opinion (Pet. App. A, a1-a2). However, after this Court's decision in *Davis* v. *Passman*, 442 U.S. 228 (1979), holding that a cause of action for damages could be implied under the due process clause of the Fifth Amendment, the court of appeals on rehearing remanded the case to the district court for further consideration in light of that decision (Pet. App. B, b1).

Despite the fact that the court of appeals reversed the dismissal of his suit and remanded the case to the district court for further consideration in the light of *Davis* v. *Passman*, *supra*, petitioner seeks review of its decision on the ground that it leaves standing the district court's other jurisdictional holdings, which he contends are erroneous. But it is plain that review by this Court at this time would be inappropriate in light of the interlocutory nature of the

[3]The district court did not reach the question whether the federal defendants are immune from suit under *Butz* v. *Economou*, 438 U.S. 478 (1978).

judgment below. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); cf. *Cobbledick* v. *United States*, 309 U.S. 323, 334-335, (1940); *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893). On remand, petitioner may prevail on the merits of his claim that the defendants' actions violated his Fifth Amendment rights and obtain the relief he seeks. Conversely, the federal defendants may establish that they are immune from suit under the standards of *Butz* v. *Economou*, 438 U.S. 478 (1978). In either event, there would be no reason to reach petitioner's challenge to the district court's other rulings. However, if the outcome of this suit ultimately turns on any of the other adverse rulings by the district court, petitioner could then seek review by this Court. The petition for a writ of certiorari is therefore premature.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980